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HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1954

No. 785

E. I. du PONT de NEMOURS & COMPANY, PETITIONER,

versus

LYLES & LANG CONSTRUCTION COMPANY,
RESPONDENT

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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The respondent prays that the Court deny the petition for certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered February 2, 1955.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unreported. It is printed (1 R. 1-37) in the appendix record in the Court of Appeals filed in this Court by petitioner. The opinion of the Court of Appeals is reported in 219 F. 2d, 328. It is printed in the appendix to the petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1). The judgment of the Court of Appeals was entered on February 2, 1955.

QUESTIONS PRESENTED

1. Does the "disputes clause" of the contract require that the factual findings of the Courts below be set aside and the issues submitted to the plant manager of the AEC's Savannah River Plant for decision?

2. Was the contract vitiated, under its anti-assignment clause, by the joint venture agreement?

3. Did respondent, in the course of the performance of its contract with du Pont, have the right to rely upon du Pont's administrative interpretations of the contract and du Pont's waiver of possible breaches?

STATEMENT

The contract here, awarded to the respondent by du Pont in its capacity as the independent contractor building the Savannah River Plant for the Atomic Energy Commission, was for the construction and operation by the respondent of a group of dormitories to house 7,500 workers at sites adjacent to the plant. The respondent was to receive a rental of $8.25 per man per week and 100% occupancy was guaranteed by du Pont for a two-year period, with the option in du Pont to extend the operations for a third year. Because of construction economies effected by the respondent, these guaranteed rentals would have yielded a profit of approximately $1,400,000.00 had the operations gone on for the full two years, but the demand for dormitory rooms envisioned by du Pont and the AEC failed to materialize and there was a series of terminations: 1,500 units at Williston, S. C. after seven months of operation,

1,500 at Allendale, S. C. after eight months, and 1,500 units at Barnwell, S. C., just before the expiration of twelve months. 3,000 units proposed for a fourth site, at Beech Island, S. C., were terminated before the dormitories were constructed.

The contract provided that upon such terminations "for the convenience of the Commission" within the first year of operation, the respondent was to receive, in lieu of all other compensation, its out-of-pocket expenses plus 20% thereof for profit and overhead less the rentals which it had already received and less the salvage value of the land and buildings. After some termination payments had been made by du Pont, serious differences arose between the parties as to the construction of the contract and this litigation became necessary.

The respondent's action (1 R. 37) was for the recovery of its costs incurred at the several sites prior to the terminations plus 20% of those costs for overhead and profit and, as a separate cause of action, for damages on account of du Pont's breach of the contract in terminating the Beech Island dormitories before they were constructed, it being the respondent's position that the contract provided for termination for convenience only after the "date of occupancy" of the various dormitories and that the premature termination at Beech Island deprived it of the minimum profit which it had bargained for, *i. e.*, 20% on the whole of the construction costs.

Du Pont's answer (1 R. 59-63) set up numerous defenses and a counterclaim for the recovery of all moneys which the plaintiff had received in the transaction, the latter upon the theory that there had been an assignment of the contract to a joint venture in violation of a provision of the contract and of Revised Statutes, Section 3737. Other defenses set up by the defendant were that the disputes

clause of the contract barred the action; that the plaintiff was entitled to its 20% profit only on the difference between its costs and its receipts from rent and salvage; that some of the plaintiff's claimed costs constituted "overhead" which must be absorbed in the 20%; that there could be no recovery of costs incurred for services rendered by members of the joint venture in excess of the actual cost of the services to the venturers; that certain of the charges were unreasonable in amount; and that interest was not recoverable. Specific attacks were made by the defendant upon some sixteen different categories of the costs sought to be recovered.

A motion by the defendant for judgment on the pleadings under its disputes clause defense and a motion to eliminate from the trial all issues claimed by the defendant to constitute disputes of fact were overruled by the Court in its order of July 7, 1953 (1 R. 106); and, after considerable discovery procedure, the cause came on for trial on its merits. The issues, both factual and legal, were thoroughly presented to the District Court. The typewritten transcript is 1193 pages in length and 88 exhibits were introduced. The defendant was represented in both the District Court and the Court of Appeals by Government counsel, who, on the last day of the trial (2 R. 555, 558), conceded that the respondent was entitled to recover in *quantum meruit* if the contract was voided by the joint venture agreement.

In a full decree dated May 7, 1954 (1 R. 1-37) the District Court disallowed certain items of recoverable costs but basically sustained the plaintiff's position, including its claim for damages on the Beech Island termination. Judgment was allowed in the amount of $854,614.50.

Du Pont and the United States appealed to the Court of Appeals for the Fourth Circuit. That Court in a unanimous opinion written by Judge Parker reversed the

award of damages for the claimed breach of contract in the Beech Island terminations,[1] reduced the rate of interest allowable before judgment and affirmed the remainder of the judgment.

The decree of the District Court, as modified by the Court of Appeals (1 R. 36, App. to pet., 25a-28a) and omitting interest, awards judgment according to the following calculation:

Total construction costs at all sites		$ 2,025,951.22
Total operation costs		404,235.46
Total costs of Lyles & Lang		$ 2,430,186.68
20% for overhead and profit (cost of community buildings eliminated)		470,284.56
Total due before deductions		$ 2,900,471.24
Deduct:		
Salvage of buildings & material	$ 131,081.39	
Agreed value of land	43,095.40	
Rental & miscellaneous income	1,440,843.82	$ 1,615,020.61
Balance payable		$ 1,285,450.63
Payments		613,412.11
Balance due		$ 672,038.52

[1] Lyles and Lang has filed a conditional cross-petition (No. 762, this Term) for a writ of certiorari to review this holding in the event that a writ is granted on the present petition.

REASONS FOR DENYING THE WRIT

I

The Disputes Clause Question

1. Both of the Courts below (1 R. 106, App. to pet., 8a-12a) held as a matter of law that the disputes clause of the contract (Section 11, 3 R. 568) had no application to the issues in this case. In this they were clearly correct. The clause applies only to "disputes concerning questions of fact arising under this agreement." It is true that factual findings by the Courts below were necessary for a solution of the basic issues in the case. Such matters as the amount of the respondent's expenditures and the salvage value of the buildings are factual in nature; but none of those findings had any importance in and of itself. None fixed the rights of the parties. The only relevance of any factual finding was as a necessary ingredient in a dollar and cents calculation of what, if anything, the plaintiff was entitled to under a proper construction of the contract.

2. The holdings below are in accord with the decision of the Court of Appeals for the Eighth Circuit in *United States v. Duggan*, 210 F. 2d 926, 932, that such disputes clauses in construction contracts have application only to disputes arising "during the course of the performance of the contract and prior to its termination." The decision of the Court of Claims in *Penker Construction Company v. United States*, 90 Ct. Cl. 1, is to the same effect. These cases declare that the clear purpose of the clause to avoid delay in Government construction is demonstrated by the requirement that pending the settlement of the dispute "the Operator shall diligently proceed with the work as directed." No decision has been found applying a disputes clause, in the language of the Court below, to "provide for unilateral determination of the amount due under the contract upon its termination." (App. to pet., p. 10 a.)

In *United States v. Blair*, 321 U. S. 730, this Court recognized that the disputes to which such clauses were intended to apply were those arising during the course of performance by saying (321 U. S. 730, 735) that the clause "provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers."

3. The holdings below are not in conflict with any decision of this Court. In *United States v. Holpuch Co.*, 328 U. S. 234, *United States v. Blair*, 321 U. S. 730, and *United States v. Callahan Walker Co.*, 317 U. S. 56, the cases relied upon by petitioner (Pet. pp. 16-21), the disputes held subject to administrative action arose during construction, pertained to the construction itself, and were subject to a decision determinative of the full rights of the parties. In *Holpuch* the disputes were "as to excavations for footings and as to increased wages ordered to be paid to respondent's bricklayers." In *Blair* the dispute concerned payment for extra labor and material which the construction superintendent had required the contractor to provide during the course of construction.

The contract language was also different. In both *Holpuch* and *Blair*, the disputes clause was not confined to questions of fact but covered all disputes, whether of fact or of law. In *Callahan Walker* the disputes clause applied by its own language only to disputes of fact but there was a separate clause which provided that when the contracting officer issued change orders and the contractor was not satisfied with the "equitable adjustment" which the contracting officer made in the contract price on account of the change, the dispute as to the proper adjustment was to be settled under the disputes clause. To be analogous, our contract in the present case would have to provide that the contractor's final compensation should be determined

by the X.Y.Z. plant manager, with all controls thereafter, whether factual or legal, subject to the disputes clause appellate procedures.

6. It must be borne in mind that the Court in these disputes clause cases is not applying a fixed rule of law or giving effect to a statute but is merely seeking to determine what the particular contracting parties intended in each case. This case, and obviously the intent the clause to apply to disputes in one setting without intending it to apply to disputes in all settings. The District Court in the present case said (1 R. 1344):

> "I cannot find in Section 11 of the present contract any indication that the parties intended that if one of them had to go to court for a determination of his rights under the contract he would not be entitled to a full determination of those rights."

A judicial determination of the legal issues between the parties was necessary and the design of a prompt and efficient administration of justice demanded a settlement of all issues at one time and by one tribunal. Nothing would be settled between the parties until there was a decision, which only a court could give, of whether there had been an invalidating assignment of the contract, or whether the 20% profit factor was to be applied before or after certain deductions were made from the plaintiff's costs, of whether the incidentals were certain charges made by persons associated in the joint venture, and of whether certain charges were required by the contract to be treated as "overhead". The defendant desired an adjudication of these questions just as much as the plaintiff did, for its secret and unauthorized personal enjoyment rested on the plaintiff's [illegible] decision of what it claimed was an illegal assignment of the contract. If no such issue had been [illegible] decision process, determination of the actual controversy would have been a [illegible]

and one certainly not within the reasonable contemplation of the parties, for the Court to hold them in abeyance while related factual issues were presented to the AEC plant manager for decision *in camera*, appealed to a Washington board and brought back to the District Court upon the question of whether the administrative findings were "supported by substantial evidence" under the test of the so-called "Wunderlich Statute" (41 U. S. C., Sec. 321).

Under the petitioner's contention, either the whole case must be reversed for that to be done on a second trial or this Court must now separate the factual issues from the legal, preserve the legal rulings in some fashion and require the making of administrative factual findings to be eventually substituted for those made by the Courts. Since the petitioners are not seeking to appeal from the factual findings below, the Court must consider them as correct. Presumably any administrative findings would also be correct and therefore identical with those now in the record. Delay might be the only result.

The statement in the *Wolpack* case which petitioner cites upon (Pet. p. 17) is that a contractor may not "choose without due cause to ignore the provisions" of a disputes clause. A contractor has "due cause" to take a controversy to Court when only a Court can settle it. It cannot be said that by "choosing to ignore" the clause when the legal position that his opposite party is taking would deny him the right of any recovery under the contract regardless of what findings are made administratively.

3. Even if the Court should grant the writ, it ought not reach the question of whether the disputes clause is applicable because both Courts below found as a fact that the defendant waived its right to rely upon it. (I R. 169, 2; App. to pet., p. 11a.) The waiver is well established in the record. Its Post never suggested that the issues between

it and the plaintiff be referred for decision under the disputes clause. Instead, the plaintiff's representatives were told that the AEC should *not* be brought into the discussions (2 R. 177-8, 208-9). Exhibit 29 (3 R. 595) is a memorandum prepared by du Pont reciting that at a conference held on November 12, 1952, the Lyles & Lang representatives were told that if they "did not feel they could settle within the bounds set forth, that they would have to resort to legal action." The respondent's attorney testified (2 R. 177) that the statement was made to him.

With the factual findings of waiver so amply supported in the record not only in these respects but also, as Judge Parker emphasizes, in the defendant's insistence upon a judicial decision of the defenses raised in its Answer and Counterclaim, this is not an appropriate case for a determination of the applicability of the disputes clause. Concurrent findings by two courts will be accepted by the Court as final in the absence of an exceptionally strong showing of error. *Comstock v. Group of Institutional Investors*, 335 U. S. 211. It will not grant a writ to review the determination of issues of fact. *General Talking Pictures Corp. v. Webster Electric Co.*, 304 U. S. 175; *United States v. Johnston*, 268 U. S. 220.

II

The Assignment Question

1. The Courts below were correct in holding that the joint venture agreement of December 17, 1951, did not constitute an assignment of the contract. The agreement (Ex. Z, 3 R. 625) specifically provided in paragraph 5 (3 R. 633) that it was not an assignment of the du Pont contract. Its purpose (as both courts below have held factually, App. to pet., pp. 12a-15a) was to permit a sharing of the profits which might be derived from the contract with those per-

sons who had contributed risk capital to the dormitory project. It had no effect whatsoever upon the respondent's performance of the contract with du Pont. None of the joint venturers has interfered with the performance or claimed any interest in the contract. The respondent alone has fully performed and its performance has been accepted by du Pont.[2]

2. The decisions of this Court and of other Federal Courts support the holdings below. In *Hobbs v. McLean*, 117 U. S. 567, the Court held that an agreement by a Government contractor to share his profits with another was not an assignment in violation of the anti-assignment statute (Revised Statutes, Section 3737, 41 U.S.C. Sec. 15) saying that the purpose of the statute "was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed." Cf. *Thompson v. Commissioner*, 3 Cir., 205 F. 2d 73.

United States v. Shannon, 342 U. S. 288, relied upon by petitioner (Pet. pp. 16, 22, 23), bears no similarity to the present case. The purposes which it lists (Page 291 of 342 U. S.) as supporting the anti-assignment statutes have no possible relevance to the claim of "assignment" here. All embody the avoidance of some possible handicap to the Government. We do not see how petitioner could be handicapped by an assignment which it never knew about. The Court of Claims has held, *Dougherty v. U. S.*, 18 Ct. Cl. 496, that an attempted assignment in violation of the statutes which the parties did not set up or claim under could not be asserted by the United States after performance by the assignor to prevent recovery.

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[2] Petitioner's claim, in footnote 18 at page 25 of the petition, that the respondent's officers admitted that the joint venture "took over" the performance of the contract rests upon an obviously incorrect reading of their testimony, as even a cursory examination of the record will demonstrate. (2 R. 330, 531-2, 536.)

3. That income tax returns were filed treating income from the dormitories and depreciation as belonging to the joint venture is of no consequence. Since one of the purposes of the joint venture agreement was to constitute the venture as the tax reporting agency, the returns would naturally be in that form. Under the holdings below, the joint venture agreement was an assignment of profits. The reporting of profits is the proper function of a tax return. Actually, "income" and "profits" have been unreal up to the present. All of the returns were on an accrual basis. No actual profits have been received by anyone. (2 R. 532.)

4. The legal question of whether there was an assignment of this contract would not be decided even if certiorari were granted because the Courts below have disposed of the contention that the contract was abrogated by holding that even if there was an invalidating assignment, this breach of the contract was waived by du Pont in demanding performance by respondent. Du Pont, and the AEC, received a copy of the joint venture agreement before the final termination, but did not then, or at any time until the answer was filed in the present suit, make any criticism of it or suggest that it violated the contract. As the District Court said (1 R. 7): "With knowledge of the joint venture agreement, the defendant thereafter negotiated many matters with the plaintiff, continued to do business with the plaintiff as in the past, wrote its letter of October 24, 1952 (plaintiff's Exh. 28) undertaking to pay the plaintiff $600,000.00 on account of the termination, paid $450,000.00 of that amount, accepted from the plaintiff performance of its duties under the contract and required the plaintiff to fulfill its obligations to demolish and remove the facilities." The Court of Appeals made similar findings (App. to pet. p. 13a). Such conduct constitutes a waiver. 12 *American Jurisprudence* 1029, 1031, Sections 447,

449 and cases cited. Having insisted upon performance of the contract by Lyles & Lang, du Pont cannot deny performance to Lyles & Lang.

The finding that there was a waiver of any breach of the contract by the joint venture agreement is another way of saying that the petitioner recognized that the joint venture agreement was **not** an assignment. The first indication to the contrary was when petitioner filed its answer in this suit. As Judge Parker said (App. to pet., p. 14a): "The defendant does not seem to have thought that there was any ground of complaint on this account until it was seized upon in an attempt to escape liability."

III

Legality of du Pont's Waiver

1. Recognizing the impossibility of avoiding the foreclosure of its two legal positions by the factual findings of waiver below, the petitioner poses a third question—whether such waiver by a Governmental independent contractor can ever be effective. This position amounts to saying that the respondent had no right to rely upon any statement, commitment or course of conduct on the part of du-Pont in administering the contract, although it was invited to deal with du Pont as the builder and operator of the plant, contracted with du Pont as the sole opposite party, knew only du Pont in the administration of the contract, and is bound by its own statements, commitments and conduct in the course of its performance to du Pont. If persons dealing with cost-plus contractors for the Government had to clear every detail of performance with the Government as well as with the contractor, it is doubtful that sufficient sub-contractors and materialmen for the accomplishment of Government work could be found.

The respondent did rely entirely upon what du Pont said and did in regard to the contract and the work to be done under it. For example, the letter of August 28, 1951, awarding the contract to respondent (Ex. 11, 3 R. 580-1) was from du Pont alone. The formal contract, which was the first document carrying AEC approval, was not executed until December 14, 1951, (2 R. 156); but the respondent had gone ahead to make large expenditures and practically complete the construction of the first 1500 units by the time the contract was signed (2 R. 162). That the formal contract and the supplements required AEC approval was of no importance to the respondent. It had never seen the du Pont-AEC contract. It had du Pont's promises and they were sufficient.

The ruling advocated by the petitioner would destroy the status of independence which cost-plus contractors now occupy under the law. Atomic Energy Acts, 42 U. S. C., Secs. 1804 (c), 2061; *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 236. Cf. *Alabama v. King*, 314 U. S. 1. In contracting with du Pont for the construction and operation of this particular Savannah River Plant, the Atomic Energy Commission has bestowed an unusually high degree of independence in du Pont. Paragraph 15 of the contract (3 R. 617) provides that du Pont shall not be responsible for any loss arising thereunder unless such loss was "caused directly by bad faith or wilful misconduct on the part of some corporate officer or officers * * * of the company."

2. As a matter of fact, the Atomic Energy Commission participated in du Pont's waiver of the disputes clause and of the possible breach by assignment. The AEC plant manager testified (2 R. 387) that his office worked very closely with du Pont on this contract. AEC auditors went over the respondent's books (2 R. 388) and were familiar with

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the nature of the respondent's claims growing out of the termination, but the AEC never suggested resort to the disputes clause. The du Pont memorandum (Ex. 29, 3 R. 595-7) which recorded the fact that respondent's representatives were told by du Pont that if they could not "settle within the bounds set forth, that they would have to resort to legal action" shows that the "bounds set forth" refers to compensation limits to be agreed to between du Pont and the AEC. The same memorandum outlines a du Pont-AEC conference held on the same day with the AEC informed of the subject of the previous conference. It is clear here and throughout the record that the AEC was perfectly familiar with du Pont's negotiations with the respondent and acquiesced in them.

Specifically on the matter of the joint venture agreement, the record shows (2 R. 381-2, 386) that the AEC plant manager received a copy of the agreement when du Pont did and discussed it with du Pont but that he permitted du Pont to go on dealing with respondent and made no claim that the agreement deprived respondent of its compensation.

IV

GENERAL OBSERVATIONS UPON THE INAPPROPRIATENESS OF THE WRIT

1. The petition seeks to bring up for review by this Court a judgment which rests upon a great mass of interwoven legal and factual determinations by the Courts below. Although the questions sought to be reviewed underlie all that has been adjudicated in the cause and a reversal would put the parties back pretty close to where they started, a grant of the writ and a decision of the posed questions in favor of the petitioner could not conclude the controversy. A determination of what is due to the respondent will still be necessary. Only the method of the determination would

be changed with no indication at the present time that the respondent would be entitled to a different amount than it now has under the judgment below. With no more tangible results to the ultimate rights of the parties than those foreseeable under the petition, this application for a writ appears to be an effort to obtain rulings upon academic questions which can be of only slight value to the Government in future cases and which the respondent cannot afford to assist in litigating upon the present complex record while the whole of its capital and large amounts of borrowed funds remain tied up. (2 R. 161, 217, 299, 530.) Two Courts have decided the basic merits of the case in the respondent's favor and it should now be paid what has been due for almost three years.

To answer fully the inferences in the petition that respondent has already been adequately compensated for its construction and operation of the dormitories would require a complete reargument of all the issues argued below. When the petitioner states, at page 14 of the petition, that the respondent had received, before suit was brought, a total of $2,228,432.72 as against direct costs, "exclusive of challenged items", of $2,127,509.10, it must be remembered that the Courts below held against petitioner on those challenged items. On one ground or another it has challenged a great part of the respondent's costs. For example, on the one contention that certain expenses should be absorbed as overhead in respondent's 20% allowance, the petitioner eliminates a total of $298,000.00 from the recoverable costs. (See footnote 6 at page 9 of the petition.) Under the petitioner's calculation of the account, presented in an appendix to its brief in the Court of Appeals, the total amount which it would allow respondent for its overhead and profit is $86,744.93. In other words, it would have the respondent absorb an amount three and a half times the amount

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within which it is to be absorbed; and that still without regard for the fact that respondent had true overhead expenses during its performance of the contract which were not charged to the du Pont job, although that was the only job being done, of more than $90,000.00 (2 R. 222-3).

The calculation by the Courts below of the amount due (*supra*, p.) shows that the judgment includes over two hundred thousand dollars of respondent's actual out-of-pocket expenses. The remaining allowance of $470,284.56 is for respondent's entire profit and overhead for a year and a half period on a two and a half million dollar job. The respondent's compensation is most reasonable and the justice of the case is with it.

2. A concession was made by Government counsel representing du Pont in the District Court which of itself should make pointless a review by this Court of either the assignment question or the disputes clause question. That concession (2 R. 555, 558) is that respondent will be entitled to recover in *quantum meruit* if it should be held that the existence of the joint venture agreement bars its right to recover under the contract. The concession was repeated in the appellant's brief in the Court of Appeals (pp. 8, 39) and appears in the present petition, p. 27. The proper measure of *quantum meruit* recovery would be at least that allowed below on the contract, since the normal *quantum meruit* standard is the value to the defendant of the plaintiff's performance and the defendant here has agreed that the plaintiff's performance is worth its out-of-pocket expenses in performing plus 20% for profit and overhead. See *Restatement of the Law of Contracts*, Sec. 357. It is possible that a *quantum meruit* recovery would be higher than the recovery on the contract since the defendant received benefits in excess of the costs to the plaintiff. The plaintiff's material and labor costs were less than the de-

fendant's expert witness Stuck testified their proper value was. (2 R. 451-2.) The plaintiff's labor scale was lower than du Pont's would be for similar work. (2 R. 504-5.) The AEC plant manager testified that the Government saved money by having a private contractor do the work. (2 R. 381.)

The Court should not grant certiorari to decide whether there has been a prohibited assignment of the contract if the only effect of an affirmative answer would be to change the name of the plaintiff's right to recover an identical amount of money. The Court's refusal to take the case for that purpose would certainly be consistent with "substantial justice" within the terms of Rule 61 of the Rules of Civil Procedure, the spirit of which Rules is applicable in this Court.

Likewise on the petitioner's disputes clause argument, a grant of the writ for the purpose of deciding whether certain factual determinations should be made by administrative agencies rather than by the Courts in an action on the contract cannot be in furtherance of substantial justice between the parties when the petitioner has conceded that a determination of the same factual matters (*e. g.*, the value of salvage and the reasonableness of fees) may be made by the same Courts in an action on *quantum meruit*.

3. The Court said in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, —— U. S. ——, May 9, 1955, 23 L. W. 4195, that a writ of certiorari should not be granted unless there is something more involved than "the academic or the episodic." The questions sought to be presented here are both; academic because they do not touch the basic and practical rights of the parties, and episodic because they are not likely to arise again in any comparable situation.

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CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 18, 1955.